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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 KENNETH D. MC ELROY, )  
7 Plaintiff, ) No. CV-08-0281-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on July 31, 2009. (Ct. Rec. 19,  
15 21). Attorney Maureen J. Rosette represents Plaintiff; Special  
16 Assistant United States Attorney Franco Becia represents the  
17 Commissioner of Social Security ("Commissioner"). The parties  
18 have consented to proceed before a magistrate judge. (Ct. Rec. 8.)  
19 On July 16, 2009, plaintiff filed a reply. (Ct. Rec. 23.) After  
20 reviewing the administrative record and the briefs filed by the  
21 parties, the court **GRANTS** Defendant's Motion for Summary Judgment  
22 (Ct. Rec. 21) and **DENIES** Plaintiff's Motion for Summary Judgment  
23 (Ct. Rec. 19).

24 **JURISDICTION**

25 Plaintiff protectively filed an application for supplemental  
26 security income benefits (SSI) on February 4, 2005 initially  
27 alleging bipolar disorder, paranoia, and alcohol addiction. (Tr.  
28

1 27,76.) Later plaintiff alleged physical problems following a  
2 stroke in 2006. The application alleges onset as of the date of  
3 filing, February 4, 2005. (Tr. 21.) The application was denied  
4 initially and on reconsideration. (Tr. 61-62, 65-68.) At a  
5 hearing before Administrative Law Judge (ALJ) Mary B. Reed on  
6 January 17, 2007, plaintiff, represented by counsel, psychologist  
7 R. Thomas McKnight, Ph.D., and vocational expert Deborah Lapoint  
8 testified. (Tr. 704-740.) Upon Judge Reed's retirement, the case  
9 was administratively assigned to ALJ Richard A. Say, who held a  
10 supplemental hearing on August 22, 2007. Plaintiff, psychologist  
11 Allen Bostwick, Ph.D., and vocational expert Daniel McKinney  
12 testified. (Tr. 743-757.) On October 10, 2007, the ALJ issued an  
13 unfavorable decision. (Tr. 21-31.) On October 30, 2007, plaintiff  
14 asked the Appeals Council to amend his application seeking a  
15 determination that he was disabled for the closed period of  
16 February 4, 2005 to January 1, 2007. (Tr. 17.) The Appeals Council  
17 received additional evidence and denied the request for review on  
18 August 29, 2008. (Tr. 6-9.) Therefore, the ALJ's decision became  
19 the final decision of the Commissioner, which is appealable to the  
20 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
21 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
22 September 11, 2008. (Ct. Rec. 1,4.)

#### 23 **STATEMENT OF FACTS**

24 The facts have been presented in the administrative hearing  
25 transcripts, the ALJ's decision, the briefs of both Plaintiff and  
26 the Commissioner, and are summarized here.

27 Plaintiff was 48 years old at the time of the hearing. (Tr.  
28 713.) He earned a GED. (Tr. 714, 721.) Plaintiff has worked as a

1 telemarketer and occasionally as a day laborer. (Tr. 94,714-716.)  
2 He used methamphetamine and alcohol but quit in June of 2004.  
3 (Tr. 717-718, 752.) Plaintiff testified in January of 2007 that he  
4 had memory problems after suffering a stroke in 2006, but his  
5 memory was "a lot more clear" when he testified on August 22,  
6 2007. (cf. Tr. 719-721 with Tr. 750.) In January of 2007, he was  
7 enrolled in English classes at a community college. (Tr. 720-721.)  
8 After the stroke, plaintiff's left hand went numb sometimes, his  
9 left leg limped, and he had shoulder pain as well as breathing  
10 problems. (Tr. 721-722,727,733-734, 751,753.) Plaintiff suffers  
11 from depression, anxiety, and sleep problems. (Tr. 723, 727-729,  
12 732, 751.) Sleep medication side effects include grogginess the  
13 next day. (Tr. 732.) In a typical day, plaintiff attends college  
14 classes two hours in the morning; he then goes to AA meetings,  
15 studies, or watches television. Plaintiff washes dishes, makes his  
16 bed and buys groceries. A friend helps him organize paying bills.  
17 (Tr. 724-726, 734-735.)

#### 18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act (the "Act") defines "disability"  
20 as the "inability to engage in any substantial gainful activity by  
21 reason of any medically determinable physical or mental impairment  
22 which can be expected to result in death or which has lasted or  
23 can be expected to last for a continuous period of not less than  
24 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
25 Act also provides that a Plaintiff shall be determined to be under  
26 a disability only if any impairments are of such severity that a  
27 plaintiff is not only unable to do previous work but cannot,  
28 considering plaintiff's age, education and work experiences,

1 engage in any other substantial gainful work which exists in the  
2 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
3 Thus, the definition of disability consists of both medical and  
4 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
5 (9<sup>th</sup> Cir. 2001).

6 The Commissioner has established a five-step sequential  
7 evaluation process for determining whether a person is disabled.  
8 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
9 is engaged in substantial gainful activities. If so, benefits are  
10 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
11 not, the decision maker proceeds to step two, which determines  
12 whether plaintiff has a medically severe impairment or combination  
13 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
14 416.920(a)(4)(ii).

15 If plaintiff does not have a severe impairment or combination  
16 of impairments, the disability claim is denied. If the impairment  
17 is severe, the evaluation proceeds to the third step, which  
18 compares plaintiff's impairment with a number of listed  
19 impairments acknowledged by the Commissioner to be so severe as to  
20 preclude substantial gainful activity. 20 C.F.R. §§  
21 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
22 App. 1. If the impairment meets or equals one of the listed  
23 impairments, plaintiff is conclusively presumed to be disabled.  
24 If the impairment is not one conclusively presumed to be  
25 disabling, the evaluation proceeds to the fourth step, which  
26 determines whether the impairment prevents plaintiff from  
27 performing work which was performed in the past. If a plaintiff  
28 is able to perform previous work, that Plaintiff is deemed not

1 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
2 At this step, plaintiff's residual functional capacity ("RFC")  
3 assessment is considered. If plaintiff cannot perform this work,  
4 the fifth and final step in the process determines whether  
5 plaintiff is able to perform other work in the national economy in  
6 view of plaintiff's residual functional capacity, age, education  
7 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
8 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon plaintiff to establish  
10 a *prima facie* case of entitlement to disability benefits.  
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
12 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
13 met once plaintiff establishes that a physical or mental  
14 impairment prevents the performance of previous work. The burden  
15 then shifts, at step five, to the Commissioner to show that (1)  
16 plaintiff can perform other substantial gainful activity and (2) a  
17 "significant number of jobs exist in the national economy" which  
18 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
19 Cir. 1984).

#### 20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a  
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
23 the Commissioner's decision, made through an ALJ, when the  
24 determination is not based on legal error and is supported by  
25 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
26 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
27 1999). "The [Commissioner's] determination that a plaintiff is  
28 not disabled will be upheld if the findings of fact are supported

1 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
2 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
3 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
4 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
6 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
7 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
8 evidence as a reasonable mind might accept as adequate to support  
9 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
10 (citations omitted). "[S]uch inferences and conclusions as the  
11 [Commissioner] may reasonably draw from the evidence" will also be  
12 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
13 On review, the Court considers the record as a whole, not just the  
14 evidence supporting the decision of the Commissioner. *Weetman v.*  
15 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v.*  
16 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

17 It is the role of the trier of fact, not this Court, to  
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
19 evidence supports more than one rational interpretation, the Court  
20 may not substitute its judgment for that of the Commissioner.  
21 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
22 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
23 substantial evidence will still be set aside if the proper legal  
24 standards were not applied in weighing the evidence and making the  
25 decision. *Browner v. Secretary of Health and Human Services*, 839  
26 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
27 evidence to support the administrative findings, or if there is  
28 conflicting evidence that will support a finding of either

1 disability or nondisability, the finding of the Commissioner is  
2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
3 1987).

#### 4 **ALJ'S FINDINGS**

5 The ALJ found at step one that although plaintiff earned some  
6 income after onset, he has not engaged in substantial gainful  
7 activity. (Tr. 23.) At steps two and three, the ALJ found that  
8 plaintiff suffers from status post cerebral vascular accident  
9 (CVA) an impairment that is severe but which does not meet or  
10 medically equal a Listing impairment. (Tr. 23, 25.) The ALJ found  
11 plaintiff less than completely credible. (Tr. 27.) At step four,  
12 relying on the VE, the ALJ found plaintiff's RFC for a full range  
13 of light work does not preclude him from performing his past  
14 relevant work as a telephone solicitor. (Tr. 30.) Accordingly,  
15 the ALJ found that plaintiff is not disabled as defined by the  
16 Social Security Act. (Tr. 31.) Because the ALJ found plaintiff  
17 not disabled at step four, no step five determination was  
18 necessary.

#### 19 **ISSUES**

20 Plaintiff contends that the Commissioner erred as a matter of  
21 law by failing to properly weigh the psychological evidence,  
22 specifically by rejecting the opinion of W. Scott Mabee, Ph.D., in  
23 favor of the opinions of Joyce Everhart, Ph.D., R. Thomas  
24 McKnight, Ph.D., and Allen Bostwick, Ph.D. Plaintiff asserts  
25 that, had the ALJ properly weighed the psychological evidence, he  
26 would have found plaintiff's psychological impairments severe at  
27 step two. (Ct. Rec. 12-17.) The Commissioner responds that the  
28 ALJ appropriately weighed the evidence and asks the Court to

1 affirm his decision. (Ct. Rec. 22 at 5,18).

2 **DISCUSSION**

3 **Weighing medical evidence**

4 In social security proceedings, the claimant must prove the  
5 existence of a physical or mental impairment by providing medical  
6 evidence consisting of signs, symptoms, and laboratory findings;  
7 the claimant's own statement of symptoms alone will not suffice.  
8 20 C.F.R. § 416.908. The effects of all symptoms must be  
9 evaluated on the basis of a medically determinable impairment  
10 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
11 416.929. Once medical evidence of an underlying impairment has  
12 been shown, medical findings are not required to support the  
13 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
14 341, 345 (9<sup>th</sup> Cr. 1991).

15 A treating physician's opinion is given special weight  
16 because of familiarity with the claimant and the claimant's  
17 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
18 Cir. 1989). However, the treating physician's opinion is not  
19 "necessarily conclusive as to either a physical condition or the  
20 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
21 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
22 a treating physician than an examining physician. *Lester v.*  
23 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
24 weight is given to the opinions of treating and examining  
25 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
26 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
27 physician's opinions are not contradicted, they can be rejected  
28 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.

1 If contradicted, the ALJ may reject an opinion if he states  
2 specific, legitimate reasons that are supported by substantial  
3 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44  
4 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

5 In addition to the testimony of a nonexamining medical  
6 advisor, the ALJ must have other evidence to support a decision to  
7 reject the opinion of a treating physician, such as laboratory  
8 test results, contrary reports from examining physicians, and  
9 testimony from the claimant that was inconsistent with the  
10 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
11 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
12 Cir. 1995).

13 Step two analysis

14 In social security proceedings, the claimant must prove the  
15 existence of a physical or mental impairment by providing medical  
16 evidence consisting of signs, symptoms, and laboratory findings;  
17 the claimant's own statement of symptoms alone will not suffice.  
18 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
19 on the basis of a medically determinable impairment which can be  
20 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
21 medical evidence of an underlying impairment has been shown,  
22 medical findings are not required to support the alleged severity  
23 of symptoms. *Bunnell v. Sullivan*,  
24 947, F. 2d 341, 345 (9<sup>th</sup> Cr. 1991).

25 An impairment or combination of impairments may be found "not  
26 severe only if the evidence establishes a slight abnormality that  
27 has no more than a minimal effect on an individual's ability to  
28 work." *Webb. Barnhart*, 433 F. 3d 683, 686-687 (9<sup>th</sup> Cir.

1 2005)(citing *Smolen v. Chater*, 80 F. 3d 1273, 1290 (9<sup>th</sup> Cir.  
2 1996); see *Yuckert v. Bowen*, 841 F. 2d 303, 306 (9<sup>th</sup> Cir. 1988).  
3 If an adjudicator is unable to determine clearly the effect of an  
4 impairment or combination of impairments on the individual's  
5 ability to do basic work activities, the sequential evaluation  
6 should not end with the not severe evaluation step. S.S.R. No.  
7 85-28 (1985). Step two, then, is "a de minimus screening device  
8 [used] to dispose of groundless claims," *Smolen*, 80 F. 3d at 1290,  
9 and an ALJ may find that a claimant lacks a medically severe  
10 impairment or combination of impairments only when his conclusion  
11 is "clearly established by medical evidence." S.S.R. 85-28. The  
12 question on review is whether the ALJ had substantial evidence to  
13 find that the medical evidence clearly established that the  
14 claimant did not have a medically severe impairment or combination  
15 of impairments. *Webb*, 433 F. 3d at 687; see also *Yuckert*, 841 F.  
16 2d at 306.

17 Plaintiff's main contention is that the ALJ failed to  
18 properly credit Dr. Mabee's opinions following his evaluations on  
19 May 25, 2006, and April 18, 2008. (Ct. Rec. 20 at 15-17, referring  
20 to Tr. 301-309, 690-701.) If the ALJ properly credited these  
21 opinions, plaintiff alleges, he would have been found to have  
22 severe mental impairments at step two, necessitating further  
23 administrative determination.

24 In 2006, Dr. Mabee, together with Steven E. Erickson, M. Ed.,  
25 a counseling therapist, diagnosed social anxiety disorder,  
26 polysubstance abuse in sustained full remission, rule out bipolar  
27  
28

1 disorder, personality disorder NOS, and a current GAF of 40-50<sup>1</sup>.  
 2 (Tr. 304.) Following the second evaluation about two years later,  
 3 Amy Robinson, under Dr. Mabee's direct clinical supervision,  
 4 diagnosed major depressive disorder, recurrent and moderate;  
 5 anxiety disorder NOS; polysubstance abuse and pathological  
 6 gambling in full sustained remission (by report); personality  
 7 disorder NOS with avoidant features; and a GAF of 50-55 with  
 8 respect to current, social and occupational functioning. (Tr.  
 9 697.)

10 The ALJ considered Dr. Mabee's opinions:

11 At the hearing in January 2007, R. Thomas  
 12 McKnight, Ph.D., psychologist, was called to testify as an  
 13 impartial medical expert. After a thorough review of the  
 14 record available at that time, Dr. McKnight testified that  
 15 the May 2006 psychological examination by Dr. Mabee was  
 16 internally inconsistent as it found the claimant to have a  
 17 full scale IQ of 107 and no cognitive deficits on evaluation  
 18 and testing but noted Dr. Mabee's conclusions relative to  
 19 cognitive difficulties implied difficulties not represented  
 20 in the test results. (Exhibit 8F) Prior neuropsychological  
 21 consultations showed the claimant's memory to be sufficient  
 22 and his thought processes concrete and literal. (Exhibit 1F)  
 23 Dr. McKnight also noted the claimant's drug and alcohol  
 24 treatment program completed in January 2005 found the  
 25 claimant to have alcohol and amphetamine dependence with a  
 26 Global Assessment of Functioning (GAF) score of 70 indicating  
 27 some mild symptoms or some difficulty in social, occupational  
 28 or school functions but generally functioning pretty well,  
 having some meaningful interpersonal relationships. That

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21  
 22 <sup>1</sup>A GAF (Global Assessment of Functioning) of **40** indicates  
 23 some impairment in reality testing or communication (e.g.,  
 24 speech is at times illogical, obscure, or irrelevant) or major  
 25 impairment in several areas, such as work or school, family  
 26 relations, judgment, thinking or mood (e.g., depressed man  
 27 avoids friends, neglects family, and is unable to work; child  
 28 frequently beats up younger children, is defiant at home, and is  
 failing at school.) A GAF of **41-50** indicates serious symptoms  
 (e.g., suicidal ideation, severe obsessional rituals, frequent  
 shoplifting) or any serious impairment in social, occupational  
 or school functioning (e.g., no friends, unable to keep a job).  
 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH  
 EDITION (DSM-IV) at p. 32.

1 chart note also mentioned that multiple sclerosis or a  
2 stroke, together with substance abuse, triggered the  
claimant's psychotic problems [sic] [in] 2004. (Exhibit 3F)

3 Dr. McKnight also noted that the Spokane Mental Health  
4 Psychiatric Assessment in March 2005 found the claimant with  
a good affect and diagnoses of a mood disorder, not otherwise  
5 specified, rule out a possible bipolar disorder and substance  
addiction in remission. Dr. McKnight further testified that  
6 although the July 2004 brain MRI showed structural problems  
cognitively, in terms of overall functioning, absent use of  
7 street drugs, there was little indication of significant  
limitations. Dr. McKnight testified he could not find a  
8 reasonable description of a personality disorder as found by  
Dr. Mabee (Exhibit 6F) and there were no active diagnosis  
9 [sic] of such (Exhibit 6F) and no characteristics were noted  
for a personality disorder. Dr. McKnight testified that the  
10 problem he had with finding the claimant had anxiety disorder  
was that the claimant was taking the type of street drugs<sup>2</sup>  
11 during that time that could mimic significant anxiety  
symptoms and trigger psychotic manifestations and the record  
12 supported that one [sic] he stopped those drugs, his symptoms  
dramatically improved<sup>3</sup>. Dr. McKnight recommended further  
13 psychological testing be performed as the claimant had been  
drug and alcohol abstinent for several years.

14 (Tr. 27-28.)

15 The ALJ notes plaintiff then underwent an evaluation by  
16 Joyce Everhart, Ph.D., on March 9, 2007 (in between Dr. Mabee's  
17 evaluations and following the first hearing). The ALJ  
18 summarizes Dr. Everhart's findings:

19 The claimant presented with allegations of memory  
20 problems with recall and understanding and with depression  
and anxiety. On examination, Dr. Everhart noted that the  
21 claimant did not present with a depressed or an extremely  
anxious demeanor. Comprehensive psychological testing  
22 revealed that he had good memory without organic organic  
mental deficiencies. The results of the . . . (MMPI-2) were  
23 deemed invalid because of certain testing scale scores  
indicating that the claimant was exaggerating symptoms. (fn  
24 2.) However, the Test of Memory Malinger (TOMM) suggested

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25 <sup>2</sup>On March 3, 2005, plaintiff told Dr. Adams he "binged" on  
26 methamphetamine for six months before he entered treatment.  
Plaintiff said he ingested one gram a day. (Tr. 272.)

27 <sup>3</sup>On November 11, 2004, plaintiff denied a history of mania  
28 or previous psychotic symptoms "except hallucinations while  
using crank." (Tr. 239.)

1 the claimant was making a credible effort. After testing,  
2 claimant was diagnosed with a mild anxiety disorder, mainly  
3 based on a self-report anxiety index, a mild depressive  
4 disorder, a history of substance induced psychosis and  
5 multiple substance addiction disorders in remission with a .  
6 . . (GAF) score of 65 to 70 indicating some mild symptoms or  
7 some difficulty in social, occupational or school functions  
8 but generally functioning pretty well and having some  
9 meaningful interpersonal relationships. (Exhibit 3) (fn 3  
10 omitted).

11 Specifically, Dr. Everhart found the claimant capable  
12 of: independently performing his activities of daily living  
13 including person care and household chores. His attention,  
14 concentration and intellectual abilities were within normal  
15 limits. He was able to listen, understand, remember and  
16 follow directions for simple tasks and he could complete  
17 three-step tasks. Dr. Everhart also noted that the claimant's  
18 then current level of functioning represented his ability to  
19 function when he is drug free. (Exhibit 19f) Upon completion  
20 of the Mental Residual Functional Capacity Assessment, Dr.  
21 Everhart reported that the claimant had slight (fn 4 omitted)  
22 to no limitations in all functional areas involving the  
23 ability to perform work-related activities. (Exhibit 20F)

24 (Tr. 28.)

25 The ALJ rejected the moderate, marked and severe impairments  
26 initially assessed by Dr. Mabee in part because they were  
27 inconsistent with his own test results, and inconsistent with Dr.  
28 Everhart's (also an examining psychologist's) test results. These  
reasons are specific, legitimate, and fully supported by the  
evidence.

29 The ALJ considered the opinion of Dr. Bostwick, who testified  
30 at the second hearing and reviewed Dr. Everhart's recent report,  
31 in addition to the rest of the record. (Tr. 28-30.) The ALJ notes  
32 Dr. Bostwick opined the record supported a history of substance-  
33 induced psychotic disorder under Listing 12.02 that resulted in  
34 plaintiff's psychiatric hospitalization, with the associated  
35 history of substance addiction disorder, primarily alcohol and  
36 methamphetamine. Both were in sustained full remission as of July  
37 of 2004, based on all the exhibits of record, when plaintiff

1 stopped using alcohol and methamphetamine. (Tr. 28-29, referring  
2 to Tr. 745-746.) Dr. Bostwick, the ALJ notes, opined plaintiff had  
3 mild depressive and mild anxiety symptoms, neither of which met  
4 the level of a disorder. (Tr. 29.) The ALJ points out Dr.  
5 Bostwick's opinion that plaintiff does not have a severe mental  
6 impairment as indicated by prior testing. (Tr. 29.)

7 In assessing the existence of a severe mental impairment, the  
8 ALJ considered plaintiff's statements and activities. (Tr. 29-  
9 30.) The ALJ refers to, but does not quote, plaintiff's March 3,  
10 2005<sup>4</sup> statement to treatment provider Jacob Adams, M.D.,:

11 "He also stated that he does not feel like he was ever  
12 really depressed from the time he was young until the time he  
13 was having problems and in the hospital. He stated that his  
drinking was more of a medication for anxiety, but he had a  
very difficult time explaining what he had anxiety about."

14 (Tr. 29, referring to Tr. 272.) The ALJ observes the providers at  
15 Spokane Mental Health found plaintiff's mood extremely stable.  
16 They noted occasional mild cognitive impairment from his  
17 medication. (Tr. 29, referring to Exhibit 6F.)

18 In weighing the conflicting medical evidence, the ALJ notes  
19 plaintiff applied for various jobs indicating his belief that he  
20 could work. (Tr. 29, referring to Exhibit 10F at Tr. 325, 371,  
21 375.) And, the ALJ adopts the opinions of Drs. McKnight, Everhart  
22 and Bostwick (who affirm the agency consultant opinions), that  
23 plaintiff did not have a severe mental impairment meeting the  
24 twelve month durational requirement of the Act. (Tr. 30.)

25 To further aid in weighing the conflicting medical evidence,  
26

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27 <sup>4</sup>Plaintiff made the statement about one month after  
28 February 4, 2005, the beginning of the claimed closed period  
of disability.

1 the ALJ evaluated plaintiff's credibility and found him less than  
2 fully credible. (Tr. 26-30.) Credibility determinations bear on  
3 evaluations of medical evidence when an ALJ is presented with  
4 conflicting medical opinions or inconsistency between a claimant's  
5 subjective complaints and diagnosed condition. See *Webb v.*  
6 *Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

7 It is the province of the ALJ to make credibility  
8 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
9 1995). However, the ALJ's findings must be supported by specific  
10 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
11 Cir. 1990). Once the claimant produces medical evidence of an  
12 underlying medical impairment, the ALJ may not discredit testimony  
13 as to the severity of an impairment because it is unsupported by  
14 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
15 1998). Absent affirmative evidence of malingering, the ALJ's  
16 reasons for rejecting the claimant's testimony must be "clear and  
17 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
18 "General findings are insufficient: rather the ALJ must identify  
19 what testimony not credible and what evidence undermines the  
20 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
21 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

22 The ALJ relied on several factors when he assessed  
23 credibility, including activities inconsistent with the degree of  
24 impairment alleged. (Tr. 27). The ALJ notes plaintiff's  
25 application alleged an inability to perform work-like activities  
26 due to bipolar disorder, paranoia and alcohol addition; however,  
27 at the same time, he indicated he needed no help with personal  
28 care, and daily activities included watching television, going for

1 walks and attending church. (Tr. 27.) Complaints of memory  
2 problems have not been corroborated by objective testing nor by  
3 plaintiff's ability to complete college classes. The level of  
4 daily activities and inconsistent statements both decrease  
5 credibility. See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup>  
6 Cir. 2002).

7 The ALJ's reasons for finding plaintiff less than fully  
8 credible are clear, convincing, and fully supported by the record.  
9 See *Thomas v. Barnhart*, 278 F. 3d at 958-959 (proper factors  
10 include inconsistencies in plaintiff's statements, inconsistencies  
11 between statements and conduct, and extent of daily activities).

12 To the extent the ALJ rejected the contradicted opinions of  
13 some of the professionals, his reasons are legitimate, specific,  
14 and supported by substantial evidence in the record. See *Lester*  
15 *v. Chater*, 81 F. 3d 821, 830-831 (9<sup>th</sup> Cir. 1995)(holding that the  
16 ALJ must make findings setting forth specific, legitimate reasons  
17 for rejecting the treating physician's contradicted opinion). It  
18 is noteworthy that Dr. Mabee is an examining, not a treating,  
19 psychologist. Even applying the higher standard applicable to  
20 treating psychologists, the ALJ's reasoning is free of error.

21 The ALJ is responsible for reviewing the evidence and  
22 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
23 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
24 trier of fact, not this court, to resolve conflicts in evidence.  
25 *Richardson*, 402 U.S. at 400. The court has a limited role in  
26 determining whether the ALJ's decision is supported by substantial  
27 evidence and may not substitute its own judgment for that of the  
28 ALJ, even if it might justifiably have reached a different result

1 upon de novo review. 42 U.S.C. § 405 (g).

2 The record supports the ALJ's step two determination that,  
3 absent DAA, plaintiff does not suffer from psychological  
4 impairments which more than mildly affect his ability to be  
5 gainfully employed. The record shows that after a stroke on  
6 November 3, 2006, plaintiff was prescribed lipitor, as well as  
7 aspirin, physical, and occupational therapy. (Tr. 570, 576, 600-  
8 610.) The ALJ notes the record shows plaintiff did not return to  
9 neurologist J. Robert Clark, M.D., after December of 2006 (Exhibit  
10 22F at Tr. 661), nor do any subjective findings support ongoing  
11 medical conditions associated with the stroke. (Tr. 29.) The ALJ  
12 is correct.

13 The ALJ's credibility determination and weighing of the  
14 medical evidence is based on substantial evidence in the record  
15 and free of legal error.

#### 16 CONCLUSION

17 Having reviewed the record and the ALJ's conclusions, this  
18 court finds that the ALJ's decision is free of legal error and  
19 supported by substantial evidence..

#### 20 IT IS ORDERED:

21 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) is  
22 **GRANTED.**

23 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 19**) is  
24 **DENIED.**

25 The District Court Executive is directed to file this Order,  
26 provide copies to counsel for Plaintiff and Defendant, enter  
27 judgment in favor of Defendant, and **CLOSE** this file.

28 DATED this 12th day of August, 2009.

s/ James P. Hutton  
JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE

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